No. 41345-1-II

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**
**DIVISION II**

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In re the Personal Restraint of:

RYAN WAYNE ALLEN,

Petitioner.

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PETITION FOR RELIEF FROM PERSONAL RESTRAINT IMPOSED PURSUANT TO JUDGMENT AND SENTENCE ENTERED IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THURSTON COUNTY

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# PETITIONER'S REPLY BRIEF

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## I. INTRODUCTION

Ryan Allen was convicted of two counts of unlawful possession of a firearm even though he was never given oral or written notice that he could not possess a firearm *and* government officials misled him into believing that he could lawfully possess firearms. Under *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008), and similar cases, Allen's convictions must be reversed and the charges dismissed.

RCW 9.41.047(1) requires that courts "provide oral and written notice" to defendants convicted of felonies that they may not possess firearms. *Minor*, 162 Wn.2d at 803. In *Minor*, our Supreme Court held that when "the predicate offense court failed to meet the statutory notice requirement and affirmatively misled [the defendant]," dismissal of a subsequent unlawful firearm conviction is required. *Minor*, 162 Wn.2d at 804 n. 7. This Court has similarly held that the State may not, consistent with due process of law, prosecute an individual for unlawful firearm possession once government officials have inadvertently misled him or her to believe he or she may lawfully possess firearms. *State v. Leavitt*, 107 Wn. App 361, 371-73, 27 P.3d 622 (2001); *see also State v. Moore,* 121 Wn. App. 889, 91 P.3d 136 (2004). Relying on *Minor* and *Leavitt*, this Court has also held that a sentencing court's failure to provide the required statutory notice – irrespective of any affirmative misadvice – prohibits the State from prosecuting an individual for unlawful firearm possession unless the individual "has otherwise acquired actual knowledge of the firearm possession prohibition." *State v.*

*Breitung*, 155 Wn. App. 606, 624, 230 P.3d 614 (2010), *review granted*, 171 Wn.2d 1016, 253 P.3d 392 (2011). Allen is entitled to relief from his convictions under *Minor*, as well as *Leavitt* and *Breitung*.

Four facts are critical to Allen's claims, facts that the State has failed to rebut and that require reversal and dismissal of Allen's convictions. *First*, the Thurston County Juvenile Court failed to provide the notice required by RCW 9.41.047(1). *Second*, the juvenile court at sentencing assured Allen that he would have no criminal record if he remained conviction free until his 23rd birthday. *Third*, the Thurston County Juvenile Probation Department failed to inform Allen that his juvenile adjudication prohibited him from possessing firearms. And *fourth*, the Thurston County Sheriff's Office conducted a criminal background check and returned a firearm to Allen. Each of these acts and omissions are sufficient, by themselves, to have led Allen to reasonably conclude that he could lawfully possess firearms. In combination, they demonstrate overwhelmingly that Allen was affirmatively misled by the State. Allen's present convictions violate both statutory and constitutional law; they must be reversed and dismissed with prejudice.

The State's general, conclusory arguments in response to Allen's claims are unavailing for several reasons. Importantly, the State concedes that Allen did not receive the notice required by RCW 9.41.047(1). The State tries to minimize this by arguing that Allen was not affirmatively misled or prejudiced by the court's failure to provide notice. The State, however, ignores or fails to dispute

the facts underlying Allen's claims. Instead, the State segregates the misinformation Allen received from various county officials into separate grounds for relief. Here, the State makes a double error – first, any of these instances would be sufficient, alone, to satisfy the "affirmatively misled" prong of *Minor*; and second, the case law requires this Court to consider the *cumulative* impact of all the actions or inactions of government officials. Additionally, Allen suffered prejudice when he thrice confessed possession of firearms to the State based on his reasonable belief that he lawfully possessed them. Finally, the State raises some half-hearted procedural arguments, but these arguments ignore long-settled case law demonstrating that Allen's claims are properly raised in this PRP.

In sum, the State's response misconstrues the controlling law and relevant facts. This Court should reject the State's unconvincing attempt to salvage Allen's invalid convictions. To hold otherwise would condone the "most indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley v. Ohio,* 360 U.S. 423, 438, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959).[1]

[1] Here, not just a privilege but a right was at stake. Both the Second Amendment and Article I, § 24 of the Washington Constitution guarantee the personal right to bear arms. *McDonald v. City of Chicago, Ill.* --- U.S. ---, 130 S.Ct. 3020, 3044, 177 L.Ed.2d 894 (2010); *State v. Sieyes*, 168 Wn.2d 276, 292, 225 P.3d 995 (2010). Nonetheless, the State may regulate firearm possession and use, including prohibiting convicted felons from possessing firearms. *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). RCW 9.41.047(1) represents the Legislature's attempt to balance these competing interests. *See Breitung*, 155 Wn. App. at 622-24 & n. 11 (discussing the Legislature's attempt to balance a citizen's right to possess firearms against the perceived need to curb gun violence by imparting actual knowledge of the firearm prohibition).

## II. ARGUMENT IN REPLY

### A. ALLEN WAS AFFIRMATIVELY MISLED BY THURSTON COUNTY OFFICIALS TO BELIEVE THAT HE COULD LAWFULLY POSSESS FIREARMS.

In *State v. Minor*, our Supreme Court held that where the predicate offense court fails to notify the defendant and the defendant shows that he was affirmatively misled, a conviction for unlawful possession of a firearm must be reversed and the underlying charge dismissed. *Minor*, 162 Wn.2d at 804 & n. 7. Because there is no dispute here that the juvenile trial court failed to notify Allen, under the analysis in *Minor*, the only question is whether he was affirmatively misled. The uncontradicted record here demonstrates that he was misled, and thus his convictions must be reversed and the charges dismissed. The State's Response misinterprets the applicable law and ignores crucial facts.

As a threshold matter, the State's Response misinterprets the law controlling Allen's due process claim by disregarding the acts and omissions of government officials other than the juvenile court. Response to Personal Restraint Petition (Response) at 8-9 (failing to address the lack of notice from the juvenile probation department and arguing that this Court should ignore the misinformation Allen received from the sheriff's department). However, settled case law requires that this Court consider the acts and omissions of all governmental entities, not just the predicate offense court.

Our Supreme Court has recognized that "where *a governmental entity* has provided affirmative, misleading information," a defendant may not be convicted

of an offense. *Minor*, 162 Wn.2d at 802 (citing *Leavitt*, 107 Wn. App at 371 n. 13) (emphasis added); *accord State v. Cross*, 156 Wn.2d 580, 601, 132 P.3d 80 (2006) ("*The State*, under certain circumstances, may not assure a person that a right exists and then act contrary to that assurance without violating due process of law") (emphasis added, citation omitted)); *Leavitt*, 107 Wn. App at 372 (due process violated "where *government officials* have misled the defendant into believing that his conduct was not prohibited." (internal quotation marks and citations omitted, emphasis added)). "[E]xpress affirmative assurances" are not required; "[a]ctions, inactions, or a combination of the two may be enough to implicate due process rights." *Moore,* 121 Wn. App. at 896 (citing *Leavitt*, 107 Wn. App. at 372).

These constitutional principles apply to all "governmental entities" (*Minor*) or "government officials" (*Leavitt*), including the police, prosecutors and the courts. *Cf. Michigan v. Jackson*, 475 U.S. 625, 634, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986), *overruled on other grounds*, *Montejo v. Louisiana*, ___ U.S. ___, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009); *see also Leavitt*, 107 Wn. App at 368 (holding that due process is violated when a "public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue" provides affirmative misadvice (citation omitted)). The Court must also consider the cumulative impact of the misinformation a defendant received from various governmental entities in determining whether he of she was affirmatively misled in violation of due process. *Leavitt*, 107 Wn. App. at 367

(considering impact of misinformation defendant received from both the court and department of corrections); *Moore,* 121 Wn. App. at 896 (considering "[a]ctions, inactions, *or a combination of the two*" as violating Moore's due process rights (emphasis added)). Thus, contrary to the State's position, this Court must consider all of the misinformation Allen received from various government officials when assessing his due process claim.

The State ignores three facts demonstrating Allen was affirmatively misled. Response at 6-7 (attempting to distinguish *Minor* and *Leavitt* by arguing that Allen's claim rests only on the failure to provide notice of the firearms prohibition by the predicate offense court). Allen was (1) told he would not have a criminal history if the reached the age of 23 without any additional convictions (Personal Restraint Petition (PRP), Appendix D, Juvenile Statement on Plea of Guilty at 2); (2) he was not informed of the firearm prohibition by probation officials (See PRP, Appendix E, Gartner Letter); and (3) his firearm was returned to him by the sheriff's department (See PRP at 17 and Appendix F). While any of these separate acts establishes that Allen was affirmatively misled, cumulatively they make a stronger case for reversal here than in *Minor*, *Leavitt*, and *Moore*.

First, as the State concedes, the juvenile court did not provide the notice required by RCW 9.41.047(1). But the State ignores two additional pieces of information the juvenile court provided that led Allen to believe he could lawfully possess firearms. The Court informed Allen that he would not have a criminal record if he remained conviction free until his 23rd birthday. PRP, Appendix D,

Juvenile Statement on Plea of Guilty at 2. The juvenile court also provided detailed information concerning every other aspect of Allen's sentence, including extensive probation conditions. PRP, Appendix D, Disposition Order at 2-3 (listing approximately ten community supervision conditions). This combination of advice, coupled with the court's failure to provide notice of the firearm prohibition, is nearly identical to the "implicit assurances" Division III found amounted to a due process violation in *Moore, supra*. *See* PRP at 14-15. Allen understandably interpreted this information to mean that he would suffer no collateral consequences as a result of the juvenile offense once he reached the age of 23 without additional convictions and acted accordingly by purchasing firearms after his 23rd birthday. *See* PRP, Appendix G, Allen Declaration at 1.

The State attempts to distinguish *Moore* because the defendant in that case received misinformation from the juvenile court on more than one occasion, Response at 7, but this is a distinction without a difference. Citizens may rely on the information provided to them by the courts, whether it is provided on one or many occasions. *Cf. Minor*, 162 Wn.2d at 804 (holding that it was "reasonable to believe that any person in Minor's position would rely on the representations of the court").

Second, Allen was not informed of the firearm prohibition by another "governmental entitiy," *Minor*, 162 Wn.2d at 802 – the juvenile probation department. *See* PRP, Appendix E, Gartner Letter. While not dispositive, the failure of yet another state actor, this one intimately involved with administering

the conditions of the sentence, to properly inform Allen "reinforced his impression" that he could lawfully possess firearms after his 23rd birthday. *Leavitt*, 107 Wn. App at 367.

The third and final piece of misinformation Allen received was from the Thurston County Sheriff's Office when it returned his firearms to him in 2005 after completing an NCIC check. *See* PRP at 17 and Appendix F. The State discounts these events for two reasons. First, it claims that there is no evidence that an NCIC check was actually conducted in this case. Response at 8-9. Second, the State asserts that this Court should disregard the misinformation Allen received from the sheriff's office because RCW 9.41.047(1) does not require law enforcement to provide any notice whatsoever. Response at 9. Both arguments are unavailing.

The State must counter Allen's evidence of the NCIC check with competent evidence, but it has instead produced no evidence at all that the check was not performed. As our Supreme Court has explained, "[t]he State's response must answer the allegations of the petition and identify all material disputed questions of fact. RAP 16.9. In order to define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence." *In re Pers. Restraint of Rice,* 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "Competent evidence" includes "affidavits or other corroborative evidence[,]" but "[b]ald assertions and conclusory allegations" will not suffice. *Id.*

Here, Allen has submitted a letter from the Thurston County Sheriff's Office explaining that it is standard practice to conduct an NCIC check prior to releasing a firearm and that the owner "then signs the 'Received by' section of the Evidence/Property form." PRP, Appendix F. Allen signed in the "Received by" section of the Evidence/Property release form. *Id.* In addition, Allen has submitted a declaration confirming his understanding that the NCIC check was conducted and that he believed the sheriff's office would not have given him a firearm he was not allowed to possess, PRP, Appendix G, – all of which conforms to the standard operating procedures of the Sheriff's Office. PRP, Appendix F (letter stating standard operating procedures for release of firearms and release form signed by Allen).

The State's failure to meaningfully rebut Allen's factual allegations is telling. The prosecutor's office has superior access to the sheriff's office. It would be a simple matter for the State to obtain a declaration from a sheriff's office employee averring that a NCIC check was not conducted prior to the release of Allen's firearm, or that such checks are not routinely conducted, if that evidence existed. This Court should presume that no such evidence exists based on the State's failure to produce it here. *See Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977) ("We have previously held on several occasions that where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of

fact may draw is that such evidence would be unfavorable to him."). Because the State has submitted no evidence, Allen's factual allegations should be presumed true. *See* PRP at 24-26.

The State's second argument, that this Court should disregard the misinformation Allen received from the sheriff's office, completely misses Allen's point. Allen has not argued that the sheriff's office was required to provide notice pursuant to RCW 9.41.047(1), but that due process required it not affirmatively mislead him concerning his right to possess firearms. This position is supported by controlling authority. For example, in *Raley v. Ohio,* 360 U.S. 423, the Ohio Un-American Activities Commission advised four witnesses that they had the right to refuse to answer questions pursuant to the Fifth Amendment when in fact a state statute granted them absolute immunity requiring that they answer the questions put to them. The witnesses were subsequently convicted of contempt. Although the Court refrained from deciding whether the Commission had any duty to inform the witnesses of their legal rights and obligations, it nonetheless concluded that the convictions amounted to the "most indefensible sort of entrapment by the State – convicting a citizen for exercising a privilege which the State clearly had told him was available to him." *Raley,* 360 U.S. at 438.

The Ninth Circuit applied *Raley* in several cases with facts similar to Allen's and found due process violations. *See United States v. Tallmadge*, 829 F.2d 767 (9th Cir. 1987) (defendant who was told by federally licensed firearms

dealer that he could purchase firearms despite his prior conviction of felonious possession of machine gun could not be prosecuted for federal firearms offense); *United States v. Batterjee*, 361 F.3d 1210 (9th Cir. 2004) (alien who, after truthfully disclosing all information required on form promulgated by the Bureau of Alcohol, Tobacco and Firearms, had been advised by federally licensed firearms dealer that he could purchase firearm could not be prosecuted for wrongfully possessing firearm and ammunition, based on his status as non-immigrant alien). In both of these cases, the defendants were misled by a federal licensee, not a law enforcement official. The misinformation Allen received from the sheriff's office is even more troubling because it came directly from law enforcement personnel. *Cf. Tallmadge*, 829 F.2d at 774 ("We have no doubt that . . . a person could not be prosecuted . . . if an ATF official had represented that a person convicted of a felony can purchase firearms after the charge has been reduced to a misdemeanor.").

The question before this Court is not whether the sheriff's office had a duty to advise Allen concerning his ability to legally possess firearms, but whether the office's "[a]ctions, inactions, or a combination of the two" violated Allen's right to due process by leading him to believe that he could lawfully possess firearms. *Moore,* 121 Wn. App. at 896. The record before this Court establishes a violation here.

The State suggests that this case is more akin to *State v. Carter,* 127 Wn. App 713, 112 P.3d 561 (2005), than *Minor*, *Moore* and *Leavitt*. Response at 7-8.

*Carter* is readily distinguishable. First and foremost, Carter received actual notice before his prosecution for unlawful firearm possession. *Carter,* 127 Wn. App. at 720-21. Because Carter acquired actual knowledge of the firearm prohibition, there was no need to consider whether the juvenile court misled him. *Accord Breitung*, 155 Wn. App. 624 (holding that dismissal may not be appropriate if the State can show "the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart[.]"). Moreover, in *Carter* the juvenile court simply failed to provide the notice required by RCW 9.41.047(1). Here, however, the juvenile court not only failed to provide that notice, it also told Allen he would not have a criminal history if he remained crime free until his 23rd birthday. Additionally, Allen was not informed of the firearm prohibition by the juvenile probation department, and the sheriff's office returned his firearm to him after implicitly assuring him that he could lawfully possess it. These facts distinguish Allen's case from *Carter* and bring it into line with *Minor*, *Moore* and *Leavitt*, where the acts and omissions of various state actors misled the defendants into believing that they could lawfully possess firearms.

The State's final two challenges to Allen's due process claim are that this Court should refuse to consider it because it was not raised in the trial court and that Allen has not shown prejudice. Response at 4, 9. Both arguments are without merit. As explained below in Section II(C), the Washington Supreme Court recently reaffirmed the long standing rule that a constitutional claim may be

raised for the first time in a PRP even if it was not raised at trial. Allen was also prejudiced by the error.

In *Leavitt, supra*, this Court found prejudice where Mr. Leavitt engaged in the following "guileless actions" as a result of governmental misadvice that caused him to believe he could possess firearms after he completed misdemeanor probation: (1) he relinquished his firearms but retained his concealed weapons permit, with the court's implicit acquiescence; (2) after receiving written notice that his one-year probation had ended, Leavitt retrieved his firearms; and (3) he spontaneously volunteered that he had firearms in his car for which he was convicted and sentenced. *Leavitt*, 107 Wn. App at 367-68.

Allen suffered prejudice similar to that of Leavitt. Just as Leavitt waited to retrieve his firearms until he completed probation, Allen waited until his 23rd birthday to acquire firearms in reliance on the misinformation he received from the juvenile court and probation department. PRP, Appendix G. Like Leavitt, Allen also volunteered to law enforcement officials on at least *three separate occasions* that he owned the very same firearms that later formed the basis of his present convictions. *See* PRP at 11 n. 5. The State attempts to downplay this prejudice by arguing that Allen "only answered questions that were asked of him" on the night he was arrested. Response at 11. But this argument is unavailing for two reasons. *First*, Allen had a right to remain silent when asked questions by the deputy. U.S. Const. Amend V; Wash. Const., Art. I, § 9. Had he known at the time that his possession of firearms was a felony, he would have stood silent in

the face of these questions and certainly would not have answered his front door with a firearm in his hand. *See State v. Allen*, 2009 WL 2437229 at *1 (describing incident leading to Allen's arrest).[2] *Second*, Allen affirmatively approached the sheriff's office to reclaim his weapon in 2005. PRP at 4 and Appendix F. Surely, approaching law enforcement about acquiring a firearm the possession of which would later result in a felony conviction is a paradigmatic example of guileless behavior.

Thus, Allen has demonstrated that he was actually and substantially prejudiced as a result of the affirmative misadvice he received from Thurston County officials. *See In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990) (holding that petitioner must establish actual prejudice from a constitutional error to obtain relief). This Court should grant Allen's PRP, reverse his convictions and remand with instructions that they be dismissed with prejudice. *Minor*, 162 Wn.2d at 804 (holding that the only "appropriate remedy" for affirmative misadvice concerning the right to possess firearms is reversal and dismissal with prejudice).

B. THE STATE FAILS TO DISTINGUISH *BREITUNG*, UNDER WHICH ALLEN IS ALSO ENTITLED TO RELIEF.

As noted above, the Washington Supreme Court has granted review in *Breitung*. *State v. Breitung*, 171 Wn.2d 1016, 253 P.3d 392 (2011). According to

[2] The fact that Allen's home was adorned with a sign stating, "No trespassing, violators will be shot and survivors will be prosecuted[,]"*State v. Allen*, 2009 WL 2437229 at *1, is further proof that he had no idea it was illegal for him to possess firearms. Otherwise, why would he announce to the world that he possessed the ability to shoot intruders?

the "Supreme Court Issues" page of the Washington Courts website, the Court granted review to decide "[w]hether a conviction for unlawful possession of a firearm is invalid if the trial court that entered judgment on the underlying conviction that made the defendant ineligible to possess firearms failed to provide the defendant notice of ineligibility under RCW 9.4[1].047(1)."[3] The online docket states that the case is scheduled for oral argument on October 11, 2011.[4] Neither party has requested a stay, and this makes sense because the Court should grant Allen relief based solely on his due process claim. Allen respectfully submits that is the correct course to follow here, but nonetheless offers the argument below in an abundance of caution and to preserve the claim.

In *Breitung*, this Court held that the RCW 9.41.047(1) notice provisions are mandatory and that failure to comply with the statute renders a subsequent conviction for unlawful possession of a firearm invalid, regardless of any affirmative misadvice by the State. *Breitung*, 155 Wn. App. at 624. The *only* exception to this rule is when State can show "the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart[.]" *Id.* The State concedes that Allen did not receive the notice required by RCW 9.41.047(1), and has not attempted to show that he received similar information from another source. The State nonetheless

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[3] Available at http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=notyetset

[4] Available at http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2011&file=docfal11#A9

argues that Allen is not entitled to relief because he did not raise the issue in the trial court and has not shown sufficient prejudice. *See* Response Response at 1, 10-11. These arguments are without merit.

As discussed above in section (II)(A), Allen was prejudiced by the failure to provide notice pursuant to RCW 9.41.047(1) when he thrice confessed to law enforcement that he possessed the firearms that later formed the basis of his convictions. *See also* Response at 10 & n. 2 (noting that this Court found prejudice in *Breitung* in light of the defendant's "responses to law enforcement" concerning the firearms he illegally possessed); PRP at 11-12 & n. 5 (discussing prejudice under *Breitung*). Moreover, a violation of RCW 9.41.047(1) should also be considered a fundamental defect inherently resulting in a complete miscarriage of justice for which relief from non-constitutional error is warranted.[5] Our Supreme Court has found a fundamental defect based on the trial court's misapplication of a discretionary sentencing statute that resulted in a potentially longer sentence. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 333-34, 166 P.3d 677 (2007). In this case, we have the juvenile court's complete failure to comply with "a mandatory provision that the convicting court give both oral and written notice of the firearm prohibition to the defendant[.]" *Breitung*, 155 Wn. App. at 624. Certainly, if the failure to correctly interpret and apply a discretionary sentencing statute resulting in a sentence that is only potentially

[5] In a PRP, the petitioner must prove by a preponderance of the evidence constitutional error causing actual and substantial prejudice or non-constitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice. *Cook*, 114 Wn.2d at 813-14.

longer than it otherwise might have been constitutes a fundamental defect, *Mulholland*, 161 Wn.2d at 333-34, then a court's complete failure to comply with a mandatory notice provision that results in two invalid convictions must also be a fundamental defect inherently resulting in a complete miscarriage of justice. *Cf. Breitung*, 155 Wn. App. at 623 ("predicate offense court's failure to comply with former RCW 9.41.047(1)'s notice requirements and [defendant's] concomitant unlawful possession of a firearm conviction demonstrates the prejudice resulting from the predicate offense court's omission.").

The State also attempts to distinguish *Breitung* because the defendant in that raised his statutory notice issue in the trial court whereas Allen did not. Response at 10. The argument is unavailing – as explained in detail below in section (II)(C), the Washington Supreme Court long ago established that a petitioner may raise a non-constitutional claim on collateral review that was not raised at trial or on direct appeal.

C. ALLEN HAS NOT DEFAULTED HIS CLAIMS BY FAILING TO RAISE THEM IN THE TRIAL COURT.

Without any citation to authority or meaningful argument, the State suggests obliquely that this Court should refuse to consider Allen's constitutional and non-constitutional claims because they were not raised in the trial court. *See* Response at 4, 10. The State's failure to cite any authority in support of its argument is not surprising because settled case law from our Supreme Court flatly contradicts the State's position in this case.

In *In re Pers. Restraint of Nichols*, 171 Wn.2d 370, --- P.3d ----, 2011 WL 1598634 at *2 (2011), the Washington Supreme Court was asked to decide whether the petitioner could raise a search and seizure issue for the first time in a PRP. Division I held that the claim was barred because it was not raised in the trial court. The Supreme Court concluded that this rule was "incorrect." *Nichols*, 2011 WL 1598634 at *2. Instead, the Court adhered to settled case law holding "that a constitutional issue can be raised for the first time in a PRP if the petitioner demonstrates actual prejudice." *Nichols*, 2011 WL 1598634 at *2 (discussing *In re Pers. Restraint of Hews,* 99 Wn.2d 80, 660 P.2d 263 (1983)). As with his statutory notice claim, Allen acknowledged this standard in his PRP and has shown that he was seriously prejudiced by the affirmative misadvice he received from Thurston County officials. *See* PRP at 6, 16-18; Section (II)(A), *supra.*

In *Cook,* 114 Wn.2d at 807, the Washington Supreme Court was asked to decide "whether a statutory challenge which was not raised at trial or on direct appeal may be considered in a personal restraint petition." After surveying the relevant case law, the Court rejected "the automatic bar to advancing a nonconstitutional argument in a personal restraint petition merely because the argument was not advanced earlier." *Id.* at 812. The Court abandoned the rigid procedural bars it had previously imposed on collateral review and replaced them with the requirement that a petitioner raising a statutory claim for the first time in a PRP show "that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* Allen acknowledged

this standard in his PRP and has shown that he was seriously prejudiced by the juvenile court's failure to comply with RCW 9.41.047(1). *See* PRP at 6, 11-12; Section (II)(B), *supra.*

The Washington Supreme Court's decisions in *Nichols* and *Cook* demonstrate that Allen's due process and statutory notice claims are cognizable in this petition despite the fact that they were not raised and adjudicated in the trial court or on direct appeal. The State's argument to the contrary must be rejected.

D. ALLEN'S CLAIMS WERE NOT RAISED AND REJECTED ON DIRECT APPEAL.

Allen has offered substantial argument why the above claims were not raised and rejected on direct appeal. PRP 18-24. Rather than engaging with these arguments, the State merely asserts that Allen's pro se pleadings on direct appeal raised the claims asserted herein and that those claims were adjudicated by both this Court and the Washington Supreme Court. Response at 11. Because the State has offered nothing in response, Allen stands on the arguments contained in his PRP with the following addition.

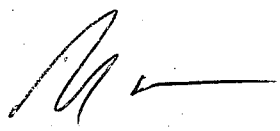
As Allen recognized in his PRP, his arguments were somewhat more developed in his pro se Petition for Review than in his pro se pleadings filed in this Court. The Petition for Review was nonetheless insufficient to command meaningful judicial review and, thus, did not raise the claims asserted in this petition. PRP at 20-21. Moreover, the Washington Supreme Court's summary, unexplained order denying the Petition for Review did not reject the claims on their merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S.Ct. 2590, 115

L.Ed.2d 706 (1991) ("[M]any formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial." (emphasis in original)); *Matia Contractors, Inc. v. City of Bellingham*, 144 Wn. App. 445, 452, 183 P.3d 1082 (2008) (noting that "the [Washington] Supreme Court's denial of review has never been taken as an expression of the court's implicit acceptance of an appellate court's decision." (citations omitted)).

For this reason, as well as those set forth in the PRP, Allen's claims were not raised and rejected on direct appeal. The State's assertion to the contrary should be rejected as unsupported by meaningful analysis and as incorrect. This Court should reach the merits of Allen's claims and grant him the relief he seeks.

## III. CONCLUSION

Based on the arguments set forth above, as well as those contained in the Personal Restraint Petition, Mr. Allen requests that this court reverse and dismiss his two convictions for unlawful possession of a firearm in the first degree.



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## CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury that he mailed via the U.S. Postal Service, postage prepaid, a true and correct copy of the foregoing brief to Olivia Zhou, Deputy Prosecuting Attorney, Thurston County Prosecutor's Office, 2000 Lakeridge Dr. S.W., Building 2, Olympia, WA 98502, on this 21st day of July, 2011.

Harry Williams IV, WSBA #41020
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